No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,
Appellants,

vs.

ROTARY CLUB OF DUARTE, et al.,
Appellees.

Appeal from the Court of Appeal
of the State of California
Second Appellate District

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does a state court judgment which enjoins a large public service organization from enforcing its male-only restriction against a local club violate the organization's First Amendment Associational rights where, inter alia, the organization:

has almost 20,000 clubs whose memberships consist of nearly 1,000,000 persons; has a multi-million dollar budget; seeks memberships from the broadest cross-section of the communities in which it has clubs; seeks to have clubs in as many communities as possible; conducts a wide-ranging public relations program; operates a publishing house which publishes hundreds of publications including a magazine which

solicits advertising from the public and which is sold to public libraries and other reading rooms; licenses its emblem to commercial firms for royalties; conducts business conferences for the club members; encourages the clubs to invite non-organization persons to be guests at club meetings; encourages the clubs to have female committees participate in the work of the clubs; whose club members or their employers, with the approval of the Internal Revenue Service, treat their dues as business expenses; whose members do not vote as to the admission of new members.

2. May an appellant be heard in this Court as to an alleged vague and over-broad application of a state's public accommodations statute when that issue was not timely presented in the state courts or when the statute both on its face and as applied to appellant is not vague? In any event, is California's public accommodations law, the Unruh Civil Rights Act, California Civil Code section 51, unconsitutionally vague or overbroad?

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Appellees move the Court to dismiss this appeal or, in the alternative, affirm the judgment of the court below on the grounds that the appeal is not within this Court's jurisdiction, that it does not present a substantial federal question, that the questions on which the decision of the case depends are so un-

substantial as not to need further argument.

Noting the practice of this Court in sometimes treating a jurisdictional statement as a petition for writ of certiorari, appellees urge the Court not to do so in this instance.

If, however, the Court should do so, appellees oppose the granting of certiorari on the grounds that the state court has not decided a federal question in any way in conflict with a decision of a state court of last resort nor with a decision of a federal court of appeals; nor has the court below decided an important question of federal law which has not been but should be settled by this Court; nor has the court below decided a federal question in a way that conflicts with applicable decisions of

this Court. Nor is there any other reason why this Court should grant review.

STATEMENT OF THE CASE

In 1977 the Rotary Club of Duarte admitted women. Subsequently, Rotary International (International) ordered Duarte to expel the women. When Duarte refused, International expelled it.

After following International's intern appeal procedures to no avail, Duarte and its women members (Duarte) filed this suit seeking reinstatement, charging International with violating, inter alia, California's public accommodations statute, the Unruh Civil Rights Act. (Cal. Civ. Code section 51; Cal. Stats. 1959, ch. 1866, sec. 1, p. 4424) The Los Angeles Superior Court refused

to reinstate the Duarte club or to issue the injunction requested, finding no violation of the Unruh Act. Duarte's own associational rights were ignored. The Court of Appeal reversed.

International's petition for rehearing in the Court of Appeal and its petition for review in the California Supreme Court were denied.

I. THIS COURT HAS NO JURISDICTION OF THE APPEAL.

In the proceedings below there was no occasion for the California courts to pass upon the validity of the Unruh Civil Rights Act, for appellants did not draw in question the validity of that act on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Title 28 U.S.C. section 1257(2) requires them to do so in order to give this Court jurisdiction on appeal.

What International did, as stated by it in its Jurisdictional Statement (pp. 4-5), is defend on the ground "that to require local Rotary clubs to admit females would violate their associational rights under the First and Fourteenth Amendments to the United States Constitution." That is how the Court of Appeal understood the defense: "International argues that forcing it to excuse compliance with the male-only membership policy would violate the associational freedoms afforded it by the federal Constitution." [JS, App. C-33] This is not sufficient. As stated by Stern & Gressman, "Supreme Court Practice," 6th Ed., p. 113:

> It is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would

> make the statute void under federal law. If he chooses not to frame his claim in that manner but argues instead that his federal rights prevent application of the statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be had in the Supreme Court only via certiorari under section 1257(3).

Mergenthaler Linotype Co. v. Davis, 251 U.S. 256 (1920), cited by the authors, fully supports their conclusion. This Court there said:

> The claim that the lease contract was made in the course of interstate commerce and therefor not subject to state statutes was insufficient to challenge the validity of the latter; at most it but asserted a "title, privilege, or immunity" under the Federal Constitution which might afford basis for certiorari, but constitutes no ground for writ of error from this court.

What International argued in

the courts below is that its federal associational rights prevented the California courts from requiring it to refrain from applying its male-only restriction to the Duarte Rotary Club. It did not argue that the application of the Unruh Act to its particular circumstances would make the Unruh Act invalid under federal law.

For example, in its brief before the Court of Appeal, International's Point II stated: "THE TRIAL COURT PROPERLY CONCLUDED THAT THE INJUNCTION SOUGHT WOULD VIOLATE ROTARY'S FREEDOM OF ASSOCIATION." Sub-point A argued: "The Jaycees Decision (referring to **Roberts v. United States Jaycees**, 468 U.S. 609 [1984]) Confirms that the Injunctive Relief Sought Would Infringe Rotary's First Amendment Freedom of Association."

This did not draw in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States nor was the decision of the court below in favor of its validity. **Jett Brothers Distilling Co. v. Carrolton**, 252 U.S. 1, 6 (1920).

II. NO NEW OR SUBSTANTIAL QUESTIONS ARE PRESENTED.

Rotary International has misstated what this case is about. International says that the California Court of Appeal has applied the Unruh Civil Rights Act "to preempt and govern the membership policies of a local Rotary club." [JS, p. 6]

That was not even an issue in the case. Rather, the Court of Appeal held that International was prohibited by the Unruh Act from preempting the membership

policies of the local club. Duarte admitted women. International tried to prevent it from so doing.

Roberts v. United States Jaycees, supra, 468 U.S. 609 (1984), settled the question affirmatively as to whether a large non-profit public service organization is subject to a state's public accommodations statute.

A. Rotary International is not the selective, intimate association which would be exempt from California's public accommodations law.

In its Point I, B (JS, pp.17-24) International argues that its expressive associational constitutional rights are violated if it is unable to enforce its male-only requirement against the California local clubs. Since International did not raise this issue below, it may not be heard on it now. **Cardinale v.**

Louisiana, 394 U.S. 437 (1969).

In any event, the point is not well taken. There is nothing about the admission of women into Rotary clubs that will in any way interfere with International's or the clubs' ability to express themselves. **Roberts**, 468 U.S. at 626-27.

In the courts below International did raise its "intimate" associational rights defense. We turn to that question.

In the first place, International is plainly wrong in its assertion [JS, 4, 12] that "the primary purpose of Rotary is to encourage a fellowship among business and professional men." Whatever place conviviality may have in the relationship among club members, it is <u>not</u> Rotary's primary purpose.

The primary purpose of Rotary,

as authoritatively set forth in its official publication, 1981 Manual of Procedure, p. 7, is that it is "an organization of business and professional men united world wide who provide humanitarian service, encourage high ethical standards in all vocations and help build goodwill and peace in the the world." Or, as stated by the managing officer of International, its General Secretary, community needs "are the objectives of Rotary and the only reason for [the clubs'] existence." [JS, App. G-34; emphasis added]

International, like the Jaycees, is not the kind of "private" organization the intimacy of which is sufficient to override California's compelling interest against sex discrimination.

In the second place, International's freedom of association

argument has already been answered by this court in **Roberts v. United States Jaycees**, supra, p. 7, and in **Hishon v. King & Spalding**, 467 U.S. 69 (1984).

International's appeal is based on the premise that **Roberts** is not applicable because the Jaycees and Rotary are different types of organizations. Actually, the Jaycees and Rotary are remarkably similar. Indeed, in its amicus curiae brief before this Court in **Roberts** International argued that this case and the Jaycees "present the same constitutional issues" [p. 3] that "organizations such as Rotary and the Jaycees are . . . entitled to protection of their associational rights . . . ." [pp. 6, 14] Similarly, the Conference of Private Organizations argued in its brief before this Court in **Roberts** in support of the Jaycees: "The

membership recruiting of the Jaycees is not unlike the practice or [sic] other restricted-class membership associations, such as national fraternal and service organizations." [p.12]

In **Roberts**, a local chapter of the Jaycees admitted women and had sanctions imposed upon it by the national organization. The United States Jaycees argued that the attempt by Minnesota to apply to it its public accommodations act violated its right to freedom of association. That argument, rejected by this Court, is the same argument International is now making .

International's rationale for this appeal is that since "it is not easy to draw a 'bright line' between private, personal associations and those in which '[t]here was no plan or purpose of exclusiveness,'" there is a "'gray area

. . . in between' protected selective associations and commercial enterprises." [JS at 7-8] This case, says International, "affords the Court an excellent opportunity to narrow and lighten such 'gray area.'" [Id. at 8]

No enlightenment is needed. If there is a "gray area," this case is not within it. International itself states, quoting from **Roberts**, a "gray area" would be a club that is relatively small, has a high degree of selectivity in membership decisions and is secluded from others. [JS, p.7] International is none of these.

International is not even composed of human beings as it takes pains to make clear [JS, pp. 3, 9, App. G-12,16]; its membership consists of 19,788 clubs. [JS, p.9] The clubs in 1982 had almost a million members. [Id.10] The

Jaycees' 7,400 chapters have fewer than 300,000. **Roberts** at 613.

International's members, the clubs, do not even vote as to who may be fellow members. That decision is made by the Board of Directors. [1981 Manual of Procedure, p.247] In their amicus curiae brief before this Court in **Roberts** in support of the Jaycees, the Conference of Private Organizations pointed out that one of the core membership functions involving the constitutional right of associations, is the right to vote. [pp. 3,6]

The "selectivity" about which International speaks [JS pp. 8, 10, 14] is not selective at all. The determention as to who may join a club is made, according to International's objective criteria (e.g. male, in a business or profession, local), by the

clubs themselves, not by International. [JS, App. G-18] Every local club must welcome any member of any other local club, even though the club had no say in selecting that person or his club. [JS, App. G-23-24]

In arguing that the Jaycees is not selective but Rotary is, International points to its purported restriction of membership to one person from each occupational category as "selectivity." [JS, p. 17] 1/ This is "selectivity" in name only. An objective of International is that <u>every</u> business, profession and institution in the

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1/ International also refers [<u>id.</u>] to "other selective criteria," such as "potential members being screened" for their reputation for business integrity, their dedication to Rotary's service objectives and their willingness to participate. These criteria are applied by Duarte and other local clubs, not by International.

community be represented. [1981 Manual of Procedure 2/ pp. 30,31]

Even the "one person" restriction is not that at all. Under certain circumstances a club has the right to admit more. [1981 Manual of Procedure, pp. 240, 249, 304] And there is not even an ostensible "one person" limitation as to the clergy, news media and diplomats. [Id. at 240] Indeed, the clubs are encouraged to obtain full representation from all the local press in the community. [Id. at 37]

As the Court of Appeal explains:

> While the classification principle--i.e.,membership criteria--established by International, and by which local clubs must abide,

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2/ The Manual of Procedure was introduced into the record as Exhibit A-3 to the deposition of Mr. Herbert A. Pigman, General Secretary of International and its active managing officer. [JS, App. G-4] It is "an authoritative statement of Rotary practices and principles." [Id. at G-7]

> might at first blush appear to be selective, Rotary's own literature dispels this notion. Noting that the classification principle "would seem to be a restrictive provision" International, through its literature, explains that "its purpose is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community." [JS, App. C-1-2; emphasis in original]

Furthermore, even if International did adhere to its one person per occupation rule, that would not make it selective. Under an accommodations statute an organization that is so selective that it is limited to doctors may not exclude women doctors or black doctors simply because of their sex or race.

The Jaycees is non-selective; so is Rotary. Nor is either of them small or secluded.

The presence of its signs at the entrances to cities and towns all over the country calling attention to itself is a graphic demonstration that there is nothing "secluded" about Rotary International.

Just as International's claim that it is selective does not stand scrutiny, neither does its claim that it is not business related, 3/ although there is no requirement that a public accommodations statute be confined to "commerce." Cf. **Sullivan v. Little Hunting Lodge**, 396 U.S. 229 (1969) [community park]; **Tillman v. Wheaton-Haven Recreation Association**, 410 U.S. 431 (1973) [community swimming pool].

3/ The trial court "found" that International is not a business establish-
(con. next pages)

The Court of Appeal found considerable evidence of Rotary's Business purposes. Among the most

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3/ment within the meaning of the Unruh Act. [JS, App. B-8] International argues that the Court of Appeal substituted its own findings for those of the trial court in holding otherwise. [JS, p.9] International confuses findings of fact with legal conclusions which the court drew from the uncotroverted facts. As the Court of Appeal pointed out, whether International is a business establishment under the Unruh Act is a question of California law, not a question of fact. [JS, App. C-16] This Court, of course, is bound by the state court's interpretation of the state statute. **Aero Mayflower Transit Co. v. Board of Railroad Commissioners**, 332 U.S. 495, 499-500 (1947).

Even so, International is in error in its attempt to suggest that somehow there is conflicting evidence in this record. There is none. The only factual dispute in the case had to do with an estoppel issue. The trial court credited International's witness and not those of Duarte. Because of this, plaintiffs did not pursue that issue on appeal. There were no other disputed facts. The facts upon which the Court of Appeal based its decision are all in uncontroverted testimony or stipulations accepted by both parties. Neither the trial court nor the Court of Appeal was presented with a deci-

significant is the Rotary Clubs members' practice of deducting their dues from their income taxes or having them paid by their businesses. The City of Hope Medical Center and the City of Duarte pay their employees' dues. [JS, App. C-25-26] A former treasurer of the Bakersfield Rotary Club testified that 95-96% of the local members' dues were paid by their companies. [Id. at C-26] The Internal Revenue Service allows such deductions. [Id. at C-25] It allows social club dues to be deducted if the club is primarily for business and the use is directly related to the conduct of the business. 28

3/ sion as to which set of conflicting facts to believe. The Court of Appeal was not bound to accept the legal conclusions of the trial court simply because that court erroneously labeled them findings of fact. **Harry Gill Co. v. Superior Court**, 238 Cal. App. 2d 666, 670, 48 Cal. Rptr. 93 (1965)

U.S.C. 274(a)(2)(A)

International cannot have it both ways. Its own members' actions show the hypocrisy of the claim that membership is completely devoid of business purposes.

International insists that because Rotarians are not supposed to join for business gains, that makes Rotary "non-business." [See JS, pp. 12-13] As the Court of Appeal points out:

> The mere fact, however, that the use of Rotary membership for commercial gain is proscribed in a written policy statement promulgated by the Board does not mean that commercial advantages and busiknees benefits have in actuality ceased to flow from Rotary membership or that they are not significant motivating forces in joining local clubs. [JS, App. C-24-25]

The court points to the evidence that "leaves no doubt that business con-

cerns are a motivating factor in joining local clubs" [Id. at C-26], and concludes:

> [T]he evidence establishes that there are business benfits enjoyed and capitalized by Rotarians and their businesses or employers.
>
> The evidence simply does not support the trial court's finding that these business advantages are merely incidental. By limiting membership in local clubs to business and professional leaders in a community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members. [Id. at C-26]

See, also, Burns, "The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality:" "few assets are as valuable as membership in the right men's club for climbing the professional ladder." 18 Harv. C. R.-C. L. L. Rev. 321, 334

(1983)

One of the services International provides for its clubs' members is business relations conferences where:

> The Rotarian learns management techniques that help improve his own business or professional skills. He receives the inspiration of discussing busness problem with experts in his own or related fields. And he enjoys the fellowship of sharing ideas with fellow Rotarians. [Trial Record, Exh. 9, Clerks' Transcript (CT) 346]

The Jaycees is a business; so is Rotary.

International criticizes the Court of Appeal for not having referred to the women plaintiffs' acknowledgment "that they did not join the Rotary Club of Duarte for the purpose of promoting their business and professional careers,

nor did they feel that they had been impeded in their pursuit of any such careers by any action of Rotary International." [JS, p. 15] International is inaccurate. The women's statement was that they did not join for that express purpose. [CT, 217C-D]

The Court of Appeal properly ignored the point because it was relevant only to the cause of action based on the California Constitution, a cause of action not reached by the Court of Appeal. It was not relevant to the Unruh Act cause of action because the Unruh Act does not require monetary harm as a basis for judgment. It is the discrimination that is the heart of the Unruh Act. That Act expresses "[California's] compelling interest in eradicating discrimination against its female citizens." **Roberts** at p. 623.

When Rotary refuses to allow women to become club members and benefit from that membership, it violates the Unruh Act regardless of whether the women suffered actual monetary injury.

Furthermore, the women were not impeded in the pursuit of their careers because they were admitted to the Duarte club. But they, like all the other members of Duarte, were harmed by the club's expulsion from International.

In its struggle to distinguish itself from the Jaycees, International notes that women participated in activities of the Jaycees and claims that Rotary club meetings are not open to the public. [JS, 20-21] But non-Rotarian guests are welcome at Rotary club meetings and special efforts are made to have them there "in order that non-

Rotarians may be better informed about the function of the Rotary club and its objectives." [1981 Manual of Procedure, p. 35] Moreover, many Rotary clubs with the encouragement of International, "have ladies committees or other associations composed of women relatives of Rotarians cooperating with and supporting them in service and other Rotary club activities." [1981 Manual of Procedure, p. 47]

The record does not reflect the extent of women's participation in Rotary activities, but in the Jaycees, as associate members, they accounted for only 2% of the membership. **Roberts** at 613.

There are few differences between the Jaycees and Rotary, but many similarities. Both are non-profit membership corporations with educational and

charitable purposes; members are recruited through local chapters; national headquarters employs a staff to help develop programs for the local chapters to enhance individual development, community development and club members' management skills. [468 U.S. at 614; JS, App. C-21-22; Extension Manual, Section III, P. 1]

While International tries to show how dissimilar it is from the Jaycees, it also argues how much like Kiwanis it is. [JS 13-14, 17] That is because of this Court's reference to Kiwanis in **Roberts**, 468 U.S. at 630, and because of a 1977 decision of the New York Court of Appeals holding that that state's public accommodations law was not applicable to Kiwanis.

This Court's reference to Kiwanis

was based on an illustrative remark by the Minnesota Supreme Court when the Jaycees case was before it. **United States Jaycees v McClure,** 305 N.W.2d 764, 771 (1981) That remark was based upon no record as to the nature of Kiwanis. **Roberts,** Appell't's Brief, p.27.4/ Concerning that, the trial court in the case said: "There is insufficient evidence in the record pertaining to the activities of [Kiwanis and other groups] to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity." **United States Jaycees v. McClure,** 534 F. Supp. 766, 773 (D. Minn. 1982)

4/ The evidence about Kiwanis in the Minnesota court consisted of Kiwanis' Constitution and By-Laws, a roster of the Minneapolis members and a thumbnail sketch of it in 1 Encyclopedia of Private Organizations. [Id.]

Nor does the record here contain any facts about Kiwanis.

Similarly, in the New York case, **Kiwanis Club of Great Neck v. Kiwanis International**, 74 N.Y.S.2d 265, 83 Misc.2d 1075 (1975), aff'd, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, 363 N.E.2d 1378 (1977), there was no trial. The trial court's declaratory judgment for Kiwanis was based on the club's motion for a temporary injunction and judgment on the pleadings and on defendant's cross-motion to dismiss. The dissenting judge in the intermediate appellate court noted the absence of a trial and argued that the preliminary injunction should be granted to preserve the status quo pending trial. **Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International**, 383 N.Y.S.2d 393,

394, 52 A. D.2d 906 (1976). It is noteworthy that the New York Court of Appeals pointed out that it was affirming the Appellate Division order (affirming the trial court) based "on this record." [41 N.Y.S.2d 633; emphasis added]

Moreover, in light of the New York Court of Appeals' 1983 decision in **United States Power Squadrons v. State Human Rights Appeal Board**, 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983) which held that a national boating and safety organization must comply with New York's public accommodations statute, the viability of the Kiwanis Club of Great Neck decision may well be questioned.

Significantly, when there was a trial as to the nature of Kiwanis, that court found that the organization is

properly subject to a state's public accommodations law. **Kiwanis International v. Ridgewood Kiwanis Club**, 627 F. Supp. 1381 (D.N.J. 1986), appeal pending, which International fails to mention,. Because the local Kiwanis club had admitted women, Kiwanis International attempted to prevent it from using the name Kiwanis. Ridgewood's defense was based on the illegality of Kiwanis' exclusion of women under New Jersey's public accommodations statute.

The court held that Kiwanis, with 8200 local clubs and a worldwide membership of 313,000, id at 1388, was not sufficiently intimate nor selective to be exempt from the law. Rotary International has more than twice the number of clubs and the local clubs have about three times as many members.

International claims that it, like the Lions, another public service organization, is entitled to exemption from public accommodations statutes. [JS, p. 23] No evidence as to the nature of Lions is presented. However, there has recently been a trial as to the application of Oregon's public accommodations statute to Lions. In that case, **Lloyd Lions Club of Portland v. International Association of Lions**, ___ Or. App. ___, (Sept. 10, 1986), pet. for hrg. pndg the Court of Appeals affirmed the trial court which had held that that organization was subject to the statute.

B. The Court of Appeal properly weighed International's freedom of association against Duarte's freedom of association and the state's interest in its woman citizens' freedom from discrimination.

The crux of International's

case is its contention that its freedom of association outweighs the state's interest in assuring its citizens' freedom from sex discrimination. Despite the undisputed facts, it tries to present a picture of smallness and intimacy.

International's concern for "little 21-member Duarte" being covered by the Unruh Act [JS, 28] is touching. But it is not Duarte that is protesting. It sees no conflict between complying wfth the Unruh Act and carrying out its function as a Rotary Club. 907,750 strong International is claiming a right to free association, a right it wants to deny to little Duarte.

International tries to use **Roberts** to support its claimed right to discriminate against women even though the decision is diametrically opposed to that

claim. As this Court stated in **Roberts**:

> Minnesota's compelling interest in eradicating sex discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms. [468 U.S. at 623]

But, of course, the rights and needs of women are only part of the issue. As this Court further explains:

> By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and political harms. [Discrimination] both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life. . . .
>
> That stigmatizing injury, and the denial of equal opportunity that accompanies it, is surely felt as strongly by persons suffering discrimination

> on the basis of their sex as by those treated differently because of their race. [Id. at 625]

Shortly before deciding **Roberts** this Court went even further in rejecting the argument that freedom of association allowed sex discrimination in violation of law. In **Hishon v. King & Spalding**, 467 U.S. 69 (1984), the question was whether federal law against employment discrimination by reason of sex [Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e et seq.] prohibited a law firm from discriminating in its partnership decisions. The judgment in **Hishon** was unanimous. If a group as intimate as a law firm partnership may not use freedom of association as an excuse for sex discrimination, an organization as large and impersonal as Rotary International

certainly may not.

III. INTERNATIONAL MAY NOT BE HEARD AS TO WHETHER THE UNRUH ACT IS VAGUE OR OVERBROAD; IN ANY EVENT, IT IS NEITHER

A. The point was not timely presented to the California courts.

In neither of its briefs in the trial court [CT, 218, 294] nor in its brief in the court below did International make a vague/overbroad argument.

In its petition for rehearing before the court below and in its petition for review before the California Supreme Court, both of which were denied without opinion, International made an argument based on "uncertainty." But this was too late, both under California law, **Cain v. French**, 25 Cal. App. 499, 502, 144 P. 302 (1914); Rule 29(b)(1), California Rules of Court, and in this Court. **Radio WOW v. Johnson**, 326 U.S.

120, 128 (1945); **Godchaux Co. v. Estopinal**, 251 U.S. 179, 181 (1919).

This Court will not hear a matter that was not properly presented to the courts below. [Id.]

B. International may not contest the validity of the Unruh Act as applied to other situations.

International overstates the rule when it says [JS, p. 25] that a constitutional challenge to a statute claimed to be vague and overbroad may be raised even by one to whom the statute, as applied, is neither. In the first place, International confuses the separate doctrines of vagueness and overbreadth. As explained in 1 Emerson & Haber, "Political and Civil Rights in the United States", 4th Ed. p. 1487:

> Despite the apparent similarity between the purpose and effect of the two doctrines, how-

> ever, the Supreme Court continues to insist that a litigant asserting a vagueness defense demonstrate that the statute in question is vague as applied to his conduct, without regard to its potentially vague application to others.

The cases support the authors. Thus, in **Parker v. Levy**, 417 U.S. 733 (1974), a free speech case in which the Court of Appeals had voided "conduct unbecoming an officer and a gentleman" type statutes on the ground of vagueness because of their possible application to persons other than the defendant, although the defendant's conduct was clearly within the statute's prohibition, this Court reversed. It said:

> The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others,

> even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe is supported by prior decisions of this Court.
> . . .
>
> [O]ne who has received fair warning of the criminality of his own conduct is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. [Id. at 756; emphasis added]

In **Hoffman Estates v. Flipside, Hoffman Estates**, 455 U.S. 489, 495 (1982), this Court again recognized the distinction: "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

International's conduct clearly falls within the precise language of the Unruh Act. Just as its male-only rule is not vague, neither is the Unruh Act's prohibition against it. There is nothing about which International has to guess when it reads the statute and is told that it may not discriminate on the basis of sex. International may not, therefore, challenge it for vagueness.

Nor may International challenge Unruh on the ground of overbreadth.

In **Broadrick v. Oklahoma**, 413 U.S. 601 (1973), this Court, though recognizing, as to specific First Amendment cases, the overbreadth exception to the general rule, pointed out that "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine. It has

been employed by the Court sparingly and only as a last resort." [Id. at 613] Refusing to strike down a statute assertedly overbroad on its face, the Court said:

> It may be that such restrictions [the wearing of political buttons or the use of bumper stickers] are impermissible and that section 818 may be susceptible of some other improper applications. But,as presently construed, we do not believe that section 818 must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face. [second emphasis added; Id. at 618]

Similarly, in **United States Civil Service Commission v. National Association of Letter Carriers**, 413 U.S. 548 (1973), this Court in answer to a challenge to the Hatch Act on the ground of overbreadth, said:

> Even if provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute as the District Court did. The remainder of the statute, as we have said, covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees and the extent to which pure expression is impermissibly threatened, if at all, by section 733.122(a)(10) and (12), does not in our view make the statute substantially overbroad and so invalid on its face. [Id. at 580-581, citing Broadrick; emph. add.]

The California courts' interpretations of the Unruh Act of which International complains do not make the act overbroad. Even if they arguably may, the remainder of the statute, the statute itself and its specific prohibitions, cover easily identifiable and constitutionally proscribable conduct. The interepretations do not threaten

pure expression.

Accordingly, there is no warrant for having further argument as to overbreadth in this case.

In **Roberts** this Court accepted the illustrative Kiwanis remark of the Minnesota Supreme Court as a demonstration of "the state court's articulated willingness to adopt limiting constructions that would exclude private groups from the statute's reach." That, "together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct." 468 U.S. at 630-31 [Emphasis added]

California has expressed its willingness and its desire to respect asso-

ciational rights despite its anti-discrimination statute when indicated.

In **Curran v. Mt. Diablo Council of Boy Scouts of America**, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), app. dism. 468 U.S. 1205 (1984), the court recognized the principles set forth in Mr. Justice Douglas' dissent in **Moose Lodge No. 107 v. Irvis**, 407 U.S. 163, 179-80 (1972), saying that the constitutional provisions "restrain the Legislature from enacting anti-discrimination laws [for] strictly private clubs or institutions." [Emphasis in original] And the court carefully considered the indicia of a private club, understanding that "[i]n determining whether an establishment is in fact a private club, there is no single test" [Id.at 730 and 731]

And in **Isbister v. Boys' Club of Santa Cruz**, 40 Cal. 3d 72, 707 P.2d 212 (1985), the California Supreme Court similarly recognized the private club exemption, saying: "We emphasize the limited scope of our holding. Nothing in our analysis necessarily extends to organizations which operate facilities not generally open to the public, or which maintain objectives and programs to which the operation of facilities is merely incidental." [Id. at 76-77]

It is thus clear that California, just as much as Minnesota, recognizes the necessity to protect associational constitutional rights. Its public accommodations law presents no unacceptable risk of application to protected conduct.

C. There is nothing about the California courts' application of the Unruh Act that is vague or overbroad.

The second question presented to this Court by International in its Jurisdictional Statement reads:

> Is the Unruh Act, construed by the California Court of Appeal as applicable to such clubs, unconstitutionally vague and overbroad as an instrument for regulating memberships protected by First Amendment freedom of association? [JS, p.i]

This question, as stated, merits little discussion. Just as there is nothing vague or overbroad (from the standpoint of understandability and applicability) about International's male-only rule, there is nothing vague or overbroad about the Unruh Act's proscription against discrimination on the basis of sex. The Court of Appeal simply ordered that International may not apply its male-only rule--may not

discriminate on the basis of sex. That is not vague or overbroad. No one can be in doubt about what that means nor to whom it applies.

In its discussion (JS, Point II, pp. 24-29), International changes the question around and complains of what "California Courts," have done in other cases in other situations. As explained above, International is in no position to complain about those other cases or situations. Even if it were, its point is not well taken.

International's argument stems from a statement in another sex discrimination case, **Isbister v. Boys' Club of Santa Cruz**, supra, 40 Cal. 3d at 86, in which the California Supreme Court reiterated what had long been the interpretation of the Unruh Act, based upon its legislative and judicial history,

that the specific proscriptions named in the Act were "illustrative rather than restrictive" and therefore the Act "accords every person an individual right against 'arbitrary' discrimination of any kind" by a business establishment.

International then asks "what is arbitrary?" [JS, p. 25] It refuses to accept the court's construction of the word that conduct which is "rationally related to the services performed and facilities provided" [**In re Cox**, 3 Cal. 3d 205, 212, 474 P.2d 992 (1970)] is not arbitrary and therefore not interdicted by the act. International then pretends it cannot understand that construction.

The construction is plain. For example, it <u>is not</u> arbitrary for a bird watchers' group to limit its membership

to people who have spotted at least fifteen types of birds. It is arbitrary to exclude female bird watchers. There is no reason why exclusion of women rationally relates to the club's goal of providing an association of experienced bird watchers.

International also wants to know "what is a business establishment?" [JS, 27] That is just another way of asking what is a place of public accommodation within a state statute which uses those words instead of California's. The careful discussion in the California cases point out that the encompassing language of the Unruh Act, not merely "business establishments," but business establishments of "every kind whatsoever," means just that. California has been no different than a number of other states which have applied their public

accommodations laws to large, public service organizations, a body of law International disregards. Examples are: the Young Men's Christian Association (**Nesmith v. Young Men's Christian Association**, 397 F.2d 96 [4th Cir 1968], **Stout v. Young Men's Christian Association**, 404 F.2d 607 [5th Cir. 1968]), Little League (**National Organization for Women v. Little League Baseball, Inc.**, 127 N.J. Super. 522, 318 A.2d 33 [1974], aff'd 67 N.J. 320, 338 A.2d 198 [1974]), Kiwanis (**Kiwanis International v. Ridgewood Kiwanis Club**, 627 F. Supp. 1381 (D.N.J. 1986], appeal pending), Lions (**Lloyd Lions Club of Portland v. International Association of Lions Clubs**, ___ Or. App. ___, ___ P.2d ___ [Sept. 10, 1986] pet. for hrg. pndg), youth football (**United States v. Slidell Youth**

Football Association, 387 F. Supp. 474, 482-84 [E.D. La 1974]), a national boating and safety organization (**United States Power Squadrons v. State Human Rights Appeal Board**, 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983).

None of the California cases complained of by International raises any vagueness or overbreadth problem.

In **Cox**, supra, 3 Cal. 3d 205, the court held that a shopper, the companion of a youth whose hair was long and who was dressed in an unconventional manner, could not be convicted of trespass when he refused to leave a shopping center after a guard told him to. Being accompanied by a "hippie" bears no relationship to making a purchase. Therefore the shopping center's conduct is arbitrary. It falls well within the

definition: conduct which is not "rationally related to the services performed and the facilities provided." 3 Cal. 3d at 217.

Isbister itself, supra, 40 Cal. 3d 72 was a straight sex discrimination case. There is nothing vague or overbroad about a statute's application to an establishment whose facilities are open only to boys.

The court in **Marina Point v. Wolfson**, 30 Cal. 3d 721, 640 P.2d 115 (1982), held that a large apartment complex could not evict a family living there simply because it had a child. International errs in its description that the complex lacked facilities for children. [JS, p. 25] The landlord contended that it was entitled to evict the family because the premises had no <u>special</u> facilities for children. As the

court pointed out, the landlord conceded that the facilities had been unaltered subsequent to the institution of the no-children policy and that children lived in the complex both before and since. 30 Cal. 3d at 728. Moreover, there is no requirement that an apartment house have special facilities in order for children to be able to live there.

In **Curran v. Mt. Diablo Council of the Boy Scouts**, supra, 147 Cal. App. 3d 712 (1983), the court held that a homosexual Eagle Scout could not be expelled merely on the ground of his sexual orientation. That orientation bore no relationship to his ability to perform the tasks of a scout, as his advancing to the highest rank made clear.

International's description of

Marsh v. Edwards Theatre Circuit, Inc., 64 Cal. App. 3d 881, 134 Cal. Rptr. 844 (1976), is disingenuous. [JS, p.26] That case was decided under a totally different statute, California Civil Code, section 54.1, (Cal. Stats. 1968, ch. 461, sec. 1 p. 1092) specially applicable to the handicapped. And the case was not decided on the ground that the theater's conduct was not "arbitrary," but rather that the statute did not require the property owner to engage in reconstruction of the premises, since they were in compliance with existing law when the premises were built. 64 Cal. App. 2d at 888

There is nothing in the construction or application of the Unruh Act by the California courts, and certainly not by the Court of Appeal in this case, that is vague or overbroad.

CONCLUSION

The appeal should be dismissed or the decision below affirmed. If the Court should treat the jurisdictional statement as a petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

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